



# IDAHO

DEPARTMENT OF FINANCE

C.L. "BUTCH" OTTER  
Governor

GAVIN M. GEE  
Director

July 6, 2007



Re: Notice of merger transaction and request for interpretive or "no-enforcement" opinion:  
Acquisition of [REDACTED]

Dear Mr. [REDACTED]:

This is in response to your submissions on June 29, 2007 and July 6, 2007 requesting this Department issue an interpretive opinion or alternatively agree to take a "no-enforcement" position if contingent payment rights ("Contingent Payment Rights") to be granted to each shareholder of [REDACTED] in connection with the proposed acquisition of [REDACTED] [REDACTED] are offered and sold in this state without being registered under applicable provisions of the Idaho Uniform Securities (2004) ("Act").

You have submitted your request on behalf of [REDACTED], [REDACTED], and [REDACTED] and [REDACTED] (together [REDACTED] and collectively with [REDACTED] and [REDACTED], the "Consortium").

We particularly note the following facts presented in your letter dated June 29, 2007 and your telephone conversation with Securities Analyst, Nancy C. Ax on July 6, 2007:

1. The Consortium has requested that the staff of the Securities and Exchange Commission (the "SEC") confirm that it will not take any enforcement action if the Contingent Payment Rights are granted to shareholders of [REDACTED] in the exchange offer without registering such grant under Section 5 of the Securities Act of 1933, as amended (the "Securities Act"), based on your view that the Contingent Payment Rights are not "securities" as defined in Section 2(1) of the Securities Act.
2. The Consortium has requested that the staff of the SEC confirm that it will not recommend any enforcement action to the Commission if the Special Purpose Vehicle, ("SPV"), involved in the proposed transaction does not register and report with respect to [REDACTED].

SECURITIES BUREAU

Bureau Chief - Marilyn T. Chastain  
800 Park Blvd, Suite 200, Boise, ID 83712  
Mail To: P.O. Box 83720, Boise ID 83720-0031  
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the Contingent Payment Rights under Section 12(g) and 13 of the U.S. Securities Exchange Act of 1934, as amended.

3. The Consortium has also requested confirmation that the staff of the SEC will not recommend any enforcement action to the Commission if the SPV does not register under the Investment Company Act of 1940, as amended.
4. The proposed transaction will not move forward in its current form if the SEC does not grant such no-action relief.
5. The Consortium has agreed to provide the Department with a copy of the SEC's response to the Consortium's request for no-action relief.

Based on these facts, we will recommend to the Director that no enforcement action be taken if the Consortium offers its Contingent Payment Rights in this state without benefit of registration. Please be advised that this letter only expresses the Bureau's position on the enforcement action and does not purport to express any legal conclusion as to whether the Contingent Payment Rights are "securities" under the Act. This "no-action" is based solely on your representation of the facts and different facts may require a different conclusion.

If you have questions or comments regarding this matter, please contact Nancy C. Ax or me at 208-332-8004.

Sincerely,

  
Marilyn T. Chastain  
Securities Bureau Chief





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2007 JUL -2 AM 10:46  
STATE OF IDAHO  
DEPT OF FINANCE

(212) 848-4000

June 29, 2007



VIA FEDERAL EXPRESS

Ms. Marilyn Chastain  
Securities Bureau Chief  
Department of Finance  
800 Park Boulevard, Suite 200  
Boise, ID 83720-0031

Dear Ms. Chastain:

**Notice of Merger Transaction and request for interpretive position:  
Acquisition of [REDACTED]  
Action requested by July 9, 2007**

We are writing on behalf of [REDACTED], [REDACTED], and [REDACTED] (together, "[REDACTED]") and together with [REDACTED] the "Consortium") with respect to the prospective acquisition of [REDACTED] and subsequent merger of [REDACTED] into the members of the Consortium.

**I. INTRODUCTION: THE CONSORTIUM SEEKS CONCURRENCE THAT CERTAIN CONTINGENT PAYMENT RIGHTS TO BE GRANTED IN CONNECTION WITH THE TRANSACTION DO NOT REQUIRE REGISTRATION OR QUALIFICATION AS A SECURITY**

We are writing to inform you of the transaction, and specifically to provide information regarding the contingent payment rights (the "Contingent Payment Rights") that will be granted to each shareholder of [REDACTED] in connection with the exchange offer described herein.

For the reasons set forth herein, the Consortium takes the view that the Contingent Payment Rights do not require registration or qualification as a security. The Consortium has requested that the Staff of the Securities and Exchange Commission (the "SEC") confirm that it will not take any enforcement action if the Contingent Payment Rights are granted to shareholders of



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[REDACTED] in the exchange offer without registering such grant under Section 5 of the Securities Act of 1933, as amended (the "Securities Act"), based on our view that that the Contingent Payment Rights are not "securities" as defined in Section 2(1) of the Securities Act. The transaction will not move forward in its current form if the SEC does not grant such no-action relief.

In the alternative, should you be unable to concur with this view, then we request your concurrence that the grant of the Contingent Payment Rights qualifies for the exemption or exclusion from registration found in Idaho's securities law for securities offered and sold in connection with a merger transaction.

The remainder of this letter (a) describes the Proposed Offer (as defined below) and the Contingent Payment Rights, and (b) sets forth the grounds for the Consortium's view that no registration or qualification of the Contingent Payment Rights is required.

## **II. THE CONSORTIUM WILL MAKE A PUBLIC OFFER FOR [REDACTED] WHICH WILL INVOLVE THE EXCHANGE OF NYSE-LISTED SECURITIES AND AN AMOUNT OF CONTINGENT PAYMENT RIGHTS**

On May 29, 2007, the Consortium announced a proposal to acquire all of the outstanding ordinary shares and American Depositary Shares representing ordinary shares of [REDACTED] (the "Proposed Offer"). The Proposed Offer will be made by a newly established special purpose vehicle jointly owned by the Consortium members ("BidCo"). A copy of the Press Release describing the Proposed Offer (the "Press Release") is attached hereto as **Exhibit A**. Please note that the terms are those found in the Press Release, but are subject to revision when the Proposed Offer is made.

### *2.1 The Proposed Offer will be conducted in the United States as a registered exchange offer of NYSE-listed securities and an amount of cash and contingent payment rights*

The Proposed Offer<sup>1</sup> will be conducted in the U.S. as a registered exchange offer that will be registered with the Securities and Exchange Commission ("SEC") on Form F-4. In the Proposed Offer, [REDACTED] shareholders would have the right to exchange each of their ordinary shares, nominal value of €0.56 per share, of [REDACTED] ("[REDACTED] Ordinary Shares") and American Depositary Shares ("ADSs"), each representing one [REDACTED] Ordinary Share, of [REDACTED] and, together with the [REDACTED] Ordinary Shares,

<sup>1</sup> As of the date hereof, the Consortium has not entered into any agreement with [REDACTED] with respect to the Proposed Offer. The statements contained in this letter with respect to [REDACTED] are based on publicly available filings in the United States and the Netherlands.

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“[REDACTED] Shares”) for €29.40 in cash, without interest, 0.844 newly issued ordinary shares, nominal value of £0.25 per share, of [REDACTED] (“[REDACTED] Ordinary Shares”) and a Contingent Payment Right. Prior to the completion of the Proposed Offer, [REDACTED] intends to establish an American Depositary Receipt facility in the U.S. in which former holders of [REDACTED] Shares who received [REDACTED] Ordinary Shares in the Proposed Offer would be able to deposit their [REDACTED] Ordinary Shares in exchange for [REDACTED]s representing [REDACTED] Ordinary Shares (“[REDACTED]”). The [REDACTED] (and [REDACTED] Ordinary Shares underlying such [REDACTED]) will be listed on the New York Stock Exchange subject to official notice of issuance, and the [REDACTED] (and [REDACTED] Ordinary Shares underlying such [REDACTED]) would as such be “covered securities” for purposes of Section 18 of the Securities Act at or before the completion of the offering. It is expected that Merrill Lynch, Pierce, Fenner & Smith Incorporated will act as Dealer Manager in this transaction.

## *2.2 Timing of the Proposed Offer*

It is expected that Form F-4 will be filed with the SEC on or immediately after July 9, 2007, and commencement of the Proposed Offer is expected to occur promptly thereafter.

## **III. DESCRIPTION OF THE CONTINGENT PAYMENT RIGHTS**

### *3.1 Introduction: a special purpose vehicle will hold the Payment Rights pending the resolution of certain litigation*

The Press Release describes that payment of €1.00 per [REDACTED] Share exchanged in the Proposed Offer (the “Contingent Consideration”) will be deferred pending resolution of certain litigation relating to a purchase and sale agreement pursuant to which [REDACTED], a subsidiary of [REDACTED], has agreed to sell to [REDACTED], including its subsidiary [REDACTED] (the “[REDACTED]”). The aggregate Contingent Consideration will be transferred by BidCo to a newly formed special purpose vehicle (the “SPV”). The aggregate funds so transferred to the SPV, together with any interest thereafter earned thereon, are herein referred to as the “Deposited Funds.”

The Contingent Payment Rights will be rights to receive cash payments on a pro rata basis from the SPV out of the Deposited Funds remaining after deduction of certain costs that may be incurred in connection with the resolution of the [REDACTED]. The Contingent Payment Rights will be governed by a claims reimbursement agreement to be entered into between BidCo and the SPV (the “Claims Reimbursement Agreement”). As a part of the current transaction structure, the Contingent Consideration portion of the transaction constitutes less than three percent of the entire transaction.

*3.2 Purpose of the Contingent Consideration and establishment and initial operation of the SPV*

The purpose of the Deposited Funds and related arrangements would be to provide funds for certain potential costs, including damages, that may be incurred by [REDACTED], any member of the Consortium and/or any of their respective affiliates arising as a result of the [REDACTED]. Pursuant to the terms of the Claims Reimbursement Agreement, the SPV would be obligated to reimburse BidCo solely out of the Deposited Funds for certain costs incurred up to the balance of the Deposited Funds by any member of the Consortium, BidCo, [REDACTED] or any of their respective affiliates. Instead of receiving the Contingent Consideration upon completion of the Proposed Offer, each holder of [REDACTED] Shares exchanged in the Proposed Offer (each a "Beneficiary") would be granted, for each [REDACTED] Share, one Contingent Payment Right.

*3.3 Operation of the SPV pending resolution of the [REDACTED]*

The SPV would invest the Deposited Funds in U.S. dollar or euro denominated demand deposits at savings institutions, U.S. money market mutual funds (either U.S. dollar or euro denominated) with the highest long-term or short-term ratings assigned by a nationally recognized statistical rating organization, or securities issued by domestic or foreign federal, state or local governments (or agencies or instrumentalities thereof). Interest earned on the Deposited Funds (net of applicable income tax) would be added to the Deposited Funds. Assuming all of the issued and outstanding [REDACTED] Ordinary Shares and [REDACTED] are accepted for exchange pursuant to the Proposed Offer, the aggregate amount of funds expected to be transferred to the special purpose vehicle would be approximately €1.9 billion.

The SPV would be required to issue annual reports to the Beneficiaries, including financial statements showing the assets and liabilities of the SPV at the end of each fiscal year and the receipts and disbursements of the SPV for the fiscal year then ended. The annual reports would also describe the changes in the SPV's assets during the reporting period and the actions taken by the SPV during the period. The SPV would also distribute to the Beneficiaries a periodic report if a material event relating to the SPV or the Deposited Funds has occurred.

*3.4 The Contingent Payment Rights are not evidence of ownership, and the SPV will conduct no business*

Other than the right to receive cash payments, if any, from the SPV out of the Deposited Funds, the Contingent Payment Rights would not represent any interest in or claim against any entity, including the SPV, [REDACTED] or any member of the Consortium. No certificates would be issued to evidence the Contingent Payment Rights, although Beneficiaries would receive a confirmation of their Contingent Payment Rights in the form of a notification for purposes of their recordkeeping and accounting. The Contingent Payment Rights would not be transferable,

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except by operation of law or by will. The Contingent Payment Rights would not entitle the Beneficiaries to any voting or dividend rights and would not bear a stated rate of interest.

All of the voting shares of the SPV would be held by a yet to be identified banking institution or trust company organized in the United States or Europe that is unaffiliated with the members of the Consortium and [REDACTED]

The SPV would not be engaged in any ongoing trade or business. Its activities would be specifically limited to conserving and protecting the Deposited Funds and making payments in connection with the resolution of the [REDACTED] including temporarily investing the Deposited Funds as described above and collecting income therefrom, making liquidating distributions to the Beneficiaries and taking such other actions as may be necessary to conserve and protect the SPV and the Deposited Funds and provide for the orderly liquidation thereof.

#### IV. THE CONTINGENT CONSIDERATION IS NOT A SECURITY

The Consortium believes that the Contingent Consideration is not a security, and, based on this view, has submitted a letter seeking confirmation from the Staff of the SEC that it will not take any enforcement action if the Contingent Payment Rights are granted to [REDACTED] Shareholders on the Exchange Offer without registration of the grant under Section 5 of the Securities Act. A copy of the draft letter requesting SEC relief, as submitted to the SEC on June 28, 2007, is attached hereto as **Exhibit B**, which letter describes in detail the view that the Contingent Payment Rights are not "securities" within the meaning of the Securities Act. Please note that the Transaction will not progress in its current form unless the SEC grants the requested no-action relief. In general, the Consortium believes that the Contingent Consideration is not a security because:

- The Beneficiaries' receipt of the Contingent Payment Rights does not involve an investment of money in a common enterprise. The economic reality is that the Contingent Payment Rights constitute a contingent deferred cash payment as partial consideration for terminating their interest in [REDACTED].
- The Contingent Payment Rights do not reflect an expectation of profits from the efforts of others. The Contingent Payment Rights represent a contingent deferred cash payment which is dependent primarily upon the outcome of any potential claims made in connection with the [REDACTED].
- The Contingent Payment Rights are not an evidence of indebtedness. There can be no assurance or reasonable expectation that any particular amount will be received by the Beneficiaries from the special purpose vehicle out of the Deposited Funds. The Contingent Payment Rights do not represent an obligation to pay a predetermined amount of money or, in fact, to pay any money, and do not bear a stated rate of interest.



- The Contingent Payment Rights will not possess any of the common characteristics of a security. The Contingent Payment Rights will not:
  - (i) have voting or dividend rights;
  - (ii) represent an equity or ownership interest;
  - (iii) represent an obligation to receive a fixed sum;
  - (iv) carry a stated interest rate;
  - (v) be transferable, except by operation of law or upon the death of the beneficial owner;
  - (vi) be evidenced by certificates; or
  - (vii) represent a separate security with a separate trading market.

The Consortium therefore believes that no registration or qualification of the Contingent Payment Rights is required.

In this regard commentators note that state courts and securities authorities have commonly followed the lead of the SEC and federal courts in considering whether specific forms and instruments fall within the definitions of "security," and especially in identifying the essential elements that define the scope of categories of securities. We ask that you find that there is merit in consistency between federal and state regulatory authorities in this matter.<sup>2</sup>

**V. IF YOU ARE UNABLE TO CONCLUDE THAT THE CONTINGENT PAYMENT RIGHTS ARE NOT SECURITIES, THEN WE SEEK YOUR CONCURRENCE THAT THE GRANT OF THE CONTINGENT PAYMENT RIGHTS DO NOT REQUIRE REGISTRATION OR QUALIFICATION**

If you are unable to conclude that the Contingent Payment Rights do not constitute securities, we seek your concurrence that the grant of the Contingent Payment Rights does not require registration or qualification in Idaho on the grounds that they are securities issued in connection with the acquisition and merger of [REDACTED] by and into the members of the Consortium within the meaning of Section 30-14-202(18) of the Idaho Uniform Securities Act of 2004.

**VI. REQUEST AND CONCLUSION**

The Consortium seeks Idaho's concurrence that the Contingent Payment Rights are not securities or alternatively that the grant of the Contingent Payment Rights does not require registration or qualification as a security on the grounds that the Proposed Offer is an exempt transaction.

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<sup>2</sup> ROBERT N. RAPP, BLUE SKY REGULATION 2-6 (2d ed. 2007); Joel Seligman, New Uniform Securities Act, 81 WASH. U. L. Q. 243, 247 n. 11 (2003).

June 29, 2007

The Proposed Offer is expected to be commenced as early as July 9, 2007. In the event we do not meet Idaho's notification requirement, with respect to timely filing, we request a waiver with respect to that provision of the exemption. Consequently, your response to this letter will be appreciated as soon as possible in order to permit the Consortium to proceed with the Proposed Offer at that time.

Please confirm receipt of this notice by stamping and returning the enclosed copy of this letter in the self-addressed stamped envelope. Please feel free to call either of the undersigned at any time if you have additional questions, or if we can be of additional assistance.

Sincerely,

